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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MARVIN LONDENE,

Plaintiff and Appellant,

v.

ASSOCIATED INSULATION OF  
CALIFORNIA, INC.,

Defendant;

FIREMAN'S FUND INSURANCE  
COMPANY,

Intervener and Respondent.

A149605

(City & County of San Francisco  
Super. Ct. Nos. CGC-11-275858)

JOHN BALDWIN et al.,

Plaintiffs and Appellants,

v.

ASSOCIATED INSULATION OF  
CALIFORNIA, INC.,

Defendant;

FIREMAN'S FUND INSURANCE  
COMPANY,

Intervener and Respondent.

A149607

(City & County of San Francisco  
Super. Ct. No. CGC-11-275949)

PAULA TARJANI et al., Plaintiffs and Appellants, v. ASSOCIATED INSULATION OF CALIFORNIA, INC., Defendant; FIREMAN’S FUND INSURANCE COMPANY, Intervener and Respondent.	A149610  (City & County of San Francisco Super. Ct. No. CGC-11-275775
VONAL CLYDE, Plaintiff and Appellant, v. ASSOCIATED INSULATION OF CALIFORNIA, INC., Defendant; FIREMAN’S FUND INSURANCE COMPANY, Intervener and Respondent.	A149612  (City & County of San Francisco Super. Ct. No. CGC-12-275981

The four consolidated appeals before us constitute one of four groups of consolidated cases, involving 19 total cases, that are or were before four divisions of this court. All arise out of orders by the same judge granting motions of Fireman’s Fund Insurance Company (Fireman’s Fund) to set aside default judgments that had been entered in favor of 19 individual plaintiffs alleging asbestos-related claims against Fireman’s Fund’s insured, Associated Insulation of California, Inc. (Associated). Associated had gone out of business many years before service of the complaints in these 19 cases and never appeared in any of the actions. The defaults in the four cases before us were all entered in 2012 and the default judgments were all entered on December 8, 2015. Fireman’s Fund did not retain counsel until February 2016. On June 8, 2016, Fireman’s Fund filed its motions to set aside the defaults and default judgments in the four cases under Code of Civil Procedure section 473, subdivision (b) and the court’s

inherent equitable powers. On June 30, 2016, the court granted the motions under both sources of authority on the grounds of extrinsic fraud or mistake.<sup>1</sup> Plaintiffs have timely appealed.

The underlying facts and asserted grounds for reversal are essentially the same in these four cases as in cases recently decided by Division Five of this court in *Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241 (petn. for review pending, petn. filed Jan. 22, 2019, S253687). Like two of the four cases considered in *Mechling*, the records in the cases before us do not indicate that Fireman's Fund received any notification of the claims of the four plaintiffs before February 2016, and at oral argument plaintiffs' counsel acknowledged that no such notice was ever given. With respect to the disputed issue of whether Fireman's Fund had a satisfactory excuse for failing to defend the original actions, Fireman's Fund's showing in the present cases is that the company was never served with the complaint or notice of entry of the default or default judgment against Associated, that it "never had the opportunity to participate in this lawsuit," and that it first retained counsel to defend the claims against Associated in February 2016. The inference that Fireman's Fund argues is to be drawn is that it did not know and had no reason to know of these plaintiffs' claims until shortly before it retained counsel, in which case it did exercise reasonable diligence in moving to set aside the defaults and default judgments in June. While we agree with plaintiffs that Fireman's Fund's showing leaves much to be desired—when did the company begin its search for the existence of coverage, when and by what means was coverage first discovered, and why was it not discovered earlier?—we cannot say that the trial court's inference that Fireman's Fund

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<sup>1</sup> The court order reads: "The default entered against defendant Associated Insulation of California on August 15, 2012 is set aside pursuant to the court's inherent, equitable power to set aside a default on the ground of extrinsic fraud or mistake. The default judgment entered against defendant Associated Insulation of California on December 8, 2015 is set aside pursuant to C.C.P. Section 473(b) and pursuant to the court's inherent, equitable power to set aside a default judgment on the ground of extrinsic fraud or mistake."

must not have learned of these claims until shortly before it retained counsel is arbitrary or entirely unreasonable.

Moreover, Fireman's Fund has submitted a request for judicial notice, which plaintiffs oppose. Insofar as the request asks the court to notice an order by the Alameda County Superior Court that also granted relief to Fireman's Fund under identical circumstances, and moving papers in support of that application, we deny the request. However, we do note that included in those moving papers is the transcript of the deposition of a knowledgeable Fireman's Fund employee who to the best of his knowledge provided answers to these questions and testified to the ultimate fact that, despite earlier unsuccessful efforts, the insurance policy covering plaintiffs' claims against Associated was not located until February 11, 2016. Plaintiffs correctly argue that this deposition was not before the trial court in the proceedings before us so should not be considered in evaluating the merit of the trial court's decision. Moreover, whether the truth of the facts disclosed by the deposition testimony in the Alameda proceedings could properly be considered by the trial court here is at a minimum subject to question. (See, e.g., *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 757-758; *Joslin v. H.A.S. Brokerage* (1986) 184 Cal.App.3d 369, 374-375 & fn. 1.) Nonetheless, we may at least observe that the same counsel for both parties appeared in the Alameda cases and the cases before us. Therefore, it rings rather hollow to suggest that plaintiffs have been left to wonder why Fireman's Fund did not earlier move to set aside the defaults. We do not excuse Fireman's Fund's failure to place the same information presented to the Alameda court in the record in these cases. Nonetheless, plaintiffs' failure to present any evidence tending to show that Fireman's Fund could have earlier discovered the relevant policy tends to support the reasonableness of the trial court's inference that it probably could not have done so.

To a large extent, the parties' briefs in *Mechling* and the present cases are identical. Upon our independent review of the record in the four cases before us, we affirm the four orders before us for the reasons set forth in *Mechling* with regard to the two cases at issue in that appeal about which Fireman's Fund was never notified.

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POLLAK, P. J.

WE CONCUR:

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TUCHER, J.

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BROWN, J.

A149605, A149607, A149610, A149612